IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 8TH MARCH 2006 / 17TH PHALGUNA, 1927

CRP.No. 993 of 2005()

CMA.51/2005 of D.C. & SESSIONS COURT,KOZHIKODE
OS.45/2001 of PRL.M.C.KOZHIKODE-I
(IA 4257 of 2004 in I.A. 3002 2003)

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REVN. PETITIONER:/APPELLANTS 3 & 4/DEFENDANTS 3 & 4:

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1. BABY SASIKALA, D/O. LATE BALAN,
   KUNIYIL HOUSE, KASABA VILLAGE,
   KALATHINKUNNU DESOM, KOZHIKODE TALUK,
   KOZHIKODE DISTRICT.

2. KALATHINKIL JAYANANDH,
   S/O. SHEKHARAN, KUNIYIL HOUSE,
   KASABA VILLAGE, KALATHINKUNNU DESOM,
   KOZHIKODE TALUK, KOZHIKODE DISTRICT.

BY ADV. SRI.P.N.RAVINDRAN

RESPONDENT/RESPONDENT/ PLAINTIFF:

KUNIYIL VINAYA KUMAR,
S/O. BALARAMAN, `K.C. GARDENS',
WAYANAD ROAD, KALATHIKUNNU AMSOM AND DESOM,
KOZHIKODE TALUK, KOZHIKODE DISTRICT.

BY ADV. SRI.T.SETHUMADHAVAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 08/03/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. No. 2847 OF 2005 IN C.R.P. 993 OF 2005

DISPOSED OF VIDE ORDER DATED 08.03.2006 IN THE C.R.P.

08.03.2006 SD/- K.T. SANKARAN, JUDGE.

/true copy/

P.A. TO JUDGE

K.T. SANKARAN, J.

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C.R.P. No. 993 OF 2005

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Dated this the 8th March, 2006

O R D E R

Respondent filed the suit for recovery of possession, injunction, damages and for return of movables against the Revision Petitioners and the predecessor in interest of first Revision Petitioner . On 11.07.2003 , the suit was decreed ex parte. All the defendants filed I.A.No. 3002 of 2003 under Order IX rule 13 of Code of Civil Procedure. That application was dismissed for default and later restored on 03.09.2004, as per the order in I.A.No.1184 of 2004. Thereafter, the application filed under Order IX Rule 13 of the Code of Civil Procedure was posted for enquiry on 15.10.2004. On that date, the second Revision Petitioner (4th defendant) could not appear before court as allegedly he was laid up . The trial court dismissed the application filed under Order IX Rule 13 of Code of Civil Procedure on 15.10.2004. The defendants filed I.A.No. 4257 of 2004 under Order IX Rule 9 and sections 141 and 151 of Code of Civil Procedure to restore

I.A.No. 3002 of 2003. On 20.05.2005, I.A.No.4257 of 2004 was dismissed. Defendants Nos. 3 and 4 filed C.M.A.No. 51 of 2005 before the District Court, Kozhikode challenging the order dated 20.05.2005. The lower lower appellate court did not issue notice to the plaintiff /respondent in the C.M.A. The question of maintainability of the appeal was considered by the learned District Judge and it was held that the appeal was not maintainable under Order XLIII Rule 1(c). The learned District Judge took that view on the ground that Order XLIII Rule 1(c) would apply only in respect of suits and since I.A.No. 4257 of 2004 is an application for restoration of another application, the order passed thereon by the trial court is not appealable under Order XLIII Rule 1(c)

2. Learned counsel for the Revision Petitioner contended that the court below did not advert to Section 141 of Code of Civil Procedure . It is submitted that Rule 1(c) of Order XLIII is to be read along with Section 141 and the word 'suit' occurring in Rule 1(c) Order XLIII would take in “proceedings” as well in view of Section 141 of the Code of Civil Procedure. Section 141 of the Code of Civil Procedure provides that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. Explanation to Section 141 says that the expression “proceedings” includes proceedings under Order IX , but does not include any proceedings under

Article 226 of the Constitution. Going by the Explanation to Section 141, it cannot be disputed that proceedings under Order IX are also proceedings within the meaning of Section 141. Since the procedure to be followed in regard to suits are to be followed in the case of any other proceedings as well, an order passed in an application under Order IX Rule 13 is also an order in a proceeding. If an order in a proceeding is to be treated as an order in a suit by a combined reading of Section 141 and Order XLIII Rule 1(c), there cannot be any doubt that an order dismissing an application filed under Rule 9 of Order IX to restore an application under Order IX Rule 13 is appealable under Order XLIII Rule 1(c). Therefore the court below was not justified in holding that the application is not maintainable .

Civil Revision Petition is allowed and the judgment under challenge is set aside. The lower appellate court shall dispose of C.M.A.No. 51 of 2005 afresh on the merits.

K.T. SANKARAN,
JUDGE.

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K.T. SANKARAN, JJ.

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C.R.P.No. 993 OF 2005

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Dated this the 8th March, 2006

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